

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2011 MSPB 73**

Docket No. SF-0752-10-0133-C-1

James Mital,

Appellant,

v.

Department of Agriculture,

Agency.

August 4, 2011

Dan Davis, Orofino, Idaho, for the appellant.

Benjamin E. Wick, Esquire, Silver Spring, Maryland, for the agency.

Ronald R. Bratton, Albuquerque, New Mexico, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the September 15, 2010 compliance initial decision that denied his petition for enforcement. For the reasons set forth below, we VACATE the compliance initial decision and REMAND this case to the Western Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was a GS-12 soil scientist with the agency's Clearwater Forest Service. Petition for Enforcement (PFE) File, Tab 10 at 15. He and the

agency entered into a settlement agreement, executed on February 4, 2010, which reduced his 30-day suspension for “conduct unbecoming” to 14 days. PFE File, Tab 6 at 4-8, Tab 10 at 14-17. The settlement agreement was entered into the record for enforcement. Initial Appeal File, Tab 11. Section 2 of the settlement agreement required the appellant to, inter alia, “limit personal business at work to established breaks, unless granted written permission otherwise from his supervisor.” PFE File, Tab 6 at 6. The appellant agreed to voluntarily resign and waive his Board appeal rights in the event that he failed to meet any of the provisions of Section 2. *Id.*

¶3 On April 23, 2010, the appellant suffered a “crisis” with a woman he “hoped to marry” when he learned that she was abruptly ending their relationship, and he used a colleague’s office to make numerous phone calls to her. PFE File, Tab 2 at 2, Tab 7 at 6. He did not seek permission to attend to this matter during his work hours. PFE File, Tab 2 at 2-3, Tab 10 at 18-19. His supervisor, Ralph Rau, became aware of this when he discovered that the appellant was not at his desk. PFE File, Tab 2 at 2. Mr. Rau informed the appellant that he had violated a provision of the settlement agreement and that he would be required to voluntarily resign within 30 days, per the terms of the agreement. *Id.*; PFE File, Tab 6 at 6. The agency subsequently effected his resignation. PFE File, Tab 10, Exhibit 3.

¶4 The appellant filed a petition for enforcement on May 18, 2010, arguing that the agency breached the settlement agreement by failing to make a good faith effort “to discuss and seek correction of any compliance or implementation issues before taking any formal non-compliance actions” per Section 3(3) of the agreement. PFE File, Tab 2 at 2, Tab 6 at 7. In the compliance initial decision, the administrative judge found that the appellant failed to meet his burden of proving that the agency was in noncompliance with the agreement. PFE File, Tab 12, Compliance Initial Decision (CID) at 5. She found that the appellant breached the settlement agreement on April 23, 2010, when he conducted personal business on government time without seeking permission from his

supervisor. *Id.* She further found that the agency acted in good faith in communicating with the appellant prior to effecting his resignation and was in full compliance with the settlement agreement. CID at 7.

¶5 The appellant has timely petitioned for review arguing, inter alia, that the administrative judge did not properly consider the intent of the parties in interpreting the provisions of the settlement agreement. Petition for Review (PFR) File, Tab 1 at 4-6. The agency opposed his petition. PFR File, Tab 7.

ANALYSIS

¶6 It is well established that a settlement agreement is a contract and the interpretation of its terms is a question of law. *Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir. 1988). In construing a contract, one looks first to the terms of the agreement to determine the intent of the parties at the time they contracted, as evidenced by the contract itself. *Id.*; *Sweet v. U.S. Postal Service*, [89 M.S.P.R. 28](#), ¶ 9 (2001). Extrinsic evidence of intent should be considered only if the terms of the agreement are ambiguous; a contract is ambiguous when it is susceptible to differing, reasonable interpretations. *Sweet*, [89 M.S.P.R. 28](#), ¶ 9. For the following reasons, we find that the settlement agreement is ambiguous, and we remand the appeal for further development of the record.

¶7 The appellant argues that Section 3(3) of the settlement agreement required the agency to engage in good faith discussions with him prior to effecting his resignation. PFR File, Tab 1 at 7-9. He asserts that this provision is crafted so as to “ensure meaningful dialogue,” and he further states that the intent of Section 3(3) is to engage in an interactive process “so extenuating circumstances could be considered and excused.” *Id.* at 6-8. At the heart of his argument are the following provisions of Sections 2 and 3 of the settlement agreement:

SECTION TWO:

In return for the above considerations, the Appellant agrees that he will:

7. limit personal business at work to established breaks, unless granted written permission otherwise from his supervisor.

* * *

9. [. . .] voluntarily resign if the Appellant fails to meet any of the provisions within Section Two of this Agreement Complainant's resignation from the agency will be effective thirty (30) days from the date the Appellant violated any of the above listed terms in Section Two, an[d] Appellant voluntarily waives any right to appeal to the Merit Systems Protection Board as a result of his resignation.

SECTION THREE:

The Appellant and the Agency hereby certify and agree:

3. to cooperate and communicate in good faith to implement and to abide by the terms of this Agreement. The Agency Representative for coordinating actions to implement this Agreement is Ronald R. Bratton, Senior Employee Relations Specialist If a party believes the other has not fully complied with one or more terms of this Agreement, that party or his/her representative shall make a good faith effort to contact the other party to discuss and seek correction of any compliance or implementation issues before taking any formal non-compliance actions.

PFE File, Tab 6 at 6-7. The record undisputedly reflects that the appellant engaged in personal business outside of his established breaks without written permission from his supervisor. PFE File, Tab 2 at 2, Tab 7 at 6. The agency then effected the appellant's resignation in accordance with Section 2(9). PFE File, Tab 6 at 2-3. The agency did not attempt to "seek correction" of the appellant's noncompliance with the provisions of Section 2 before he was forced to resign. *Id.*; PFE File, Tab 10 at 4-5 & Exhibits 3, 4.

¶8 Section 2(9) of the settlement agreement clearly states that if the appellant violates any of the terms of Section 2, he will voluntarily resign and waive his Board appeal rights with respect to his resignation. Section 3(3) of the agreement states that the parties shall make a good faith effort "to discuss and seek correction of any compliance or implementation issues before taking any formal non-compliance actions." The dispute of the parties concerns the manner in which to construe Section 2(9) in light of their differing interpretations of the meaning of Section 3(3). The appellant argued that Section 3(3) of the settlement agreement required the agency to engage in a good faith effort to contact him to discuss and seek correction of his violation of Section 2 prior to effecting his

resignation and that the agency failed to do so. PFE File, Tab 2 at 2. The agency asserted that it was not required to attempt to correct the appellant's behavior once he was in violation of Section 2(7), that it did communicate with him in good faith regarding the steps it was taking to effect his termination, and that it was under no obligation to change the terms and conditions of the agreement by renegotiating the provision that called for the appellant's resignation. PFE File, Tab 10 at 4-5. Further, it asserted that the language of Section 3(3) relates to the obligations of the parties to communicate in good faith prior to taking formal non-compliance action, such as appealing to the Board, and that it was the appellant who failed to communicate with the agency, pursuant to Section 3(3), prior to filing his petition for enforcement.¹ PFE File, Tab 6 at 2-3.

¶9 As set forth above, the appellant and the agency have construed the meaning of Section 3(3) differently. The appellant construed the terms “non-compliance action” to include the agency's actions to effect his resignation, thus obligating the agency to “seek correction” prior to effecting his resignation. The agency interpreted the terms “non-compliance action” to specifically mean a petition for enforcement with the Board, thus obligating the appellant to “seek correction” prior to filing a formal petition for enforcement but not requiring the agency to “seek correction” of the appellant's behavior prior to effecting his resignation. The settlement agreement is susceptible to two differing, reasonable interpretations, and there is no evidence in the record regarding the parties' intent at the time they entered into the settlement agreement. *See Sweet*, [89 M.S.P.R. 28](#), ¶¶ 13, 15. For these reason, we find that the terms of the settlement agreement are ambiguous and remand this case to the regional office for

¹ The record indicates that the appellant asserted to the agency, before filing his petition for enforcement, that it had failed to engage in the good faith communication requirement. PFE, Tab 9 at 12-13 (May 3, 2010 letter from the appellant to the agency stating, in relevant part: “I want to make a ‘good faith effort,’ in light of the ‘extenuating circumstances’ and subsequent psychological diagnosis, to ‘seek correction of any compliance or implementation issues before taking any formal non-compliance actions.’”), 16-18 (May 18, 2010 letter to the administrative judge describing the appellant's efforts to communicate with the agency).

submission of extrinsic evidence of the parties' intent, including hearing testimony if necessary, and for additional fact finding.² *Id.*, ¶ 15; *see Birdsong v. Department of the Navy*, [75 M.S.P.R. 524](#), 529 (1997). After the administrative judge determines the proper interpretation of the settlement agreement, she shall then determine whether the agency is in compliance with the agreement as properly construed.

ORDER

¶10 Accordingly, we remand this case to the Western Regional Office for further proceedings and adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

² In light of our decision to remand for further development of the record and additional factfinding, we have not considered the additional arguments in the appellant's petition for review.